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## The Barometer

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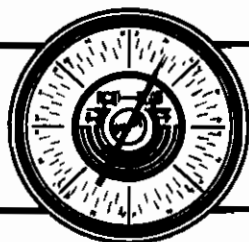
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# THE BAROMETER

(Writer's comments on the President of the Naval War College Convocation address.)

The November-December 1972 issue of the *Naval War College Review* contained the President's Convocation address of 24 August which emphasized the value of the study of history. The return to the study of history at the Naval War College has ample and impressive precedent.

The study of history influenced three of our greatest admirals of World War II: King, Nimitz, and Spruance. All three were students of history, they read voraciously, and they learned historic principles that were later successfully applied in war. One of the most important principles concerned the relationship between the high commander and his principal subordinates.

This relationship is a topic for frequent argument within the military profession, whether it is called *Supervision of Planned Action* or *Command and Control*. The crux of the argument is the commander's degree of supervision and control over his subordinates. Sophisticated computer, display, and communication equipments have allowed high commanders to become involved in the decisions and details of tactical operations at the lowest level—it was said at one point in the Vietnam war that a platoon leader needed permission from the White House to redeploy his squads.

Oversupervision of subordinate commanders was anathema to King, Nimitz, and Spruance. Their philosophy, which

was shared by most top commanders, was to pick good men and to trust them to do the job. The three believed in telling their subordinates what they wanted done, giving them the necessary resources, and then letting them alone so they could accomplish their mission. They believed that the commanders at the scene of action were best qualified to make the necessary tactical decisions, and these three admirals made it a point to never interfere nor offer gratuitous advice. Thus their subordinates were allowed freedom of action and the use of their initiative, a principle which proved its value time and again.

It is certain that these admirals developed this principle by having read military history and biographies, as well as by personal experience. Regardless of the kind of war or when it is fought, there will always be a high commander and subordinate commanders and the question of the relationship between them. King was a student of the Napoleonic wars and was intimately familiar with the careers of all of Napoleon's marshals. King believed that the great weakness of the French Army was that it required Napoleon's detailed supervision. Whenever he sent his marshals on an independent mission, they always got "messed up." King concluded from his study of the Napoleonic wars that subordinate commanders must be trained for independent action.

King had formed these beliefs as early as 1908, when he was a lieutenant teaching at the Naval Academy. In 1940 he became Commander in Chief, At-

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lantic Fleet, and issued his famous policy directive, *Exercise of Command—Excess of Detail in Orders and Instructions*, which incorporated his concepts he had developed so long ago. One of King's type commanders had unwisely persisted in oversupervising subordinates and received a withering reprimand from King. Said King, "I am convinced that in the long run the Fleet policy will produce greater dividends in efficiency than if we keep on trying to prescribe too much in detail just how much each and every occurrence shall be dealt with."

Both Nimitz and Spruance had read Freeman's biography of Robert E. Lee and were much impressed by Lee's style of leadership. Lee picked good men and trusted them to get the job done. Another popular book during the thirties was Henderson's biography of Stonewall Jackson, which was required reading and a basis for much discussion at the Naval War College. Both Lee and Jackson had a knack for evaluating the capabilities and potentials of their subordinates; they expected no more of their men than what they were capable of performing.

Nimitz and Spruance developed their styles of leadership from many sources and inspirations, but certainly the examples of Lee and Jackson were a predominant factor in shaping how those two admirals fought World War II.

The examples of the lessons that are learned from history are endless, substantiating that there is great value in reading and studying about great leaders and great battles of the past. In the years just before World War II the Naval War College required that its students read the works of Mahan, Corbett, and Foch, and the students studied military biographies and discussed them at length. In the 1936-1937 academic year the college staff prepared and delivered two presentations on historical military operations, five on historical joint operations, and 16 on maritime history.

These presentations were prepared by naval officers and not civilian lecturers, manifesting that a great many officers of that generation were intimately familiar with military history. The officer who initiated these presentations recognized their value to the naval profession. He was the brilliant Kelly Turner, one of the greatest of the World War II admirals.

The study of military history and biography has both advocates and detractors. One wag facetiously has said that the trouble with the military is that they prepare for battles of the future by ignoring the future through a preoccupation with the past. It is clear, however, that many great naval leaders of World War II were students of history and had discovered principles that they successfully used in making war.

THOMAS B. BUELL  
Commander, U.S. Navy

(Writer's comments on Captain Lewis' article "Automating the Naval Officer Selection and Promotion System," which appeared in the September-October issue.)

Despite Captain Lewis' warning of "cries from the uninformed," I feel that his proposal should not be entirely unchallenged.

Computer enthusiasts have been foreboding the "information explosion" for some time, but automation is not the sole solution to the voluminous data problem. As a matter of fact, the first step suggested by Captain Lewis is to eliminate useless information from the fitness report. Perhaps the first step is sufficient. There is no reason to believe that the quantity of data to be reviewed by a selection board must progressively increase. A shrinking Navy, with slower promotions and smaller zones, should lessen the problem to some degree. Many other steps could be taken to reduce the amount of information to be assimilated by the board. Why, for

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example, should a ream of ensign/lieutenant (junior grade) fitness reports be retained in captains or commanders jackets? If they carry much weight, the system is out of perspective. In an automated system, they would indeed carry weight but their influence and identity would be hidden in the programmed algorithms. There are many ways to hold down the volume of useless information, but turning to computers tends to discourage such efforts in the long run.

The concern that automation will reduce the human element in the selection process is a matter of degree. It is just the final step in a continuous trend toward quantification of human performance. The promotion system has already been reduced to evaluation of stacks of paper at the Arlington Annex. Professional exams are long gone, likewise correspondence courses, and the selection boards do not interview contenders. They are, in fact, picking the best fitness report jackets, not necessarily the best people. Even so, I'm sure that the selection board does not want to be relieved of the burden of trying to find the best people through painstaking examination of the raw data available. Elimination of remarks, however bland or deceiving, and total quantification of performance would not only make the board's work easier, but unnecessary. Comparison of "B plus performers" with "A minus performers" is alarming enough without carrying it out to two decimal places. The individual officer must be convinced that his career opportunities depend on his unique talents, qualifications, education, and personal ability rather than the maintenance of a high multiple.

Captain Lewis raises an interesting issue as to whether or not the fitness report should be used for assignment as well as promotion. It is doubtful if a separate reporting system for detailers would be eagerly accepted, so a single report will have to do. There are

however, other approaches. One solution could be to have different fitness report forms for different ranks. It has never seemed realistic to suppose that a single format would be adequate to report on a 21 year old ensign and a 45 year old captain. The emphasis at the early stages of the career (ensign through lieutenant) should be on description rather than evaluation of performance. One or two performance grades should suffice to detect the small percentage of passovers at that stage, while a complete and serious verbal description of the individual should be invaluable to the assignment officer if the Bureau ever elects to match personnel characteristics with accurate billet descriptions. The young officer should be encouraged to learn and develop instead of pursuing "top performance" grades.

Finally, the mechanics of an automated system are always compared favorably with "inefficient" human processing. It is becoming evident, however, that the human resources needed to manage a system usually increase with the introduction of computers. Unlike some large data management systems, 99 percent accuracy is probably not acceptable for such a vital data base. A substantial investment in human quality control will be needed to insure that a career is not destroyed because of a program "bug," a keypunch error, or a speck of dirt on a magnetic tape.

The demise of the written remarks and the total quantification of performance would be a blow to the individuality which the "new" Navy is trying to nurture. I think it is best if the selection boards continue to have a difficult task. It should, in fact, be made more difficult by breathing more life into the fitness report system.

In closing, I hope that Captain Lewis' article is a signal that the Naval War College intends to promote open discussion of this subject, which must be

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considered one of the most important keys to the quality of the future Navy.

R.A. McCAFFERY  
Commander, U.S. Navy

(Writer's comments on Lieutenant Colonel Hart's article "Yamashita, Nuremberg and Vietnam: Command Responsibility Re-appraised," which appeared in the September-October issue.)

In his article Lt. Col. Franklin Hart has correctly elucidated the pertinent background on the Yamashita case to dispose of the Yamashita myth. While Lieutenant Colonel Hart should be commended for his article, at least one other facet of the problem deserves further exploration. More particularly I am speaking of the interrelated concepts of military necessity, unnecessary suffering and proportionality, and command decisions in the context of war. Lieutenant Colonel Hart has stated that "a military commander may legally employ air and artillery firepower against a populated area from which he is receiving fire or which is offering armed resistance."<sup>1</sup> Although this statement is not really incorrect,<sup>2</sup> it contains no concrete guidance for commander utilization of firepower in such a context. A later statement can be found for guidance or decisional purposes which reiterates the need for a balance to be drawn between the necessity for the employment of certain firepower and the death, suffering, and destruction which is a foreseeable byproduct of the use of that firepower under the circumstances.<sup>3</sup> The principle of proportionality is a legal principle which expresses the need for such a balance or the need for a proportionate use of firepower (related to the leadership principle of "economy of force"), and a proper attention to that principle by a commander in a given circumstance will justify the conclusion that no "unnecessary" death, destruction, or suffering has occurred.<sup>4</sup> A phrase which

reflects these three principles on the use of force is: A military commander may utilize the most effective lawful means available to accomplish an otherwise legitimate military objective with the least amount of foreseeable excess death, destruction, or suffering.<sup>5</sup> When we then consider the very next sentence of Hart's work, we find that it is not only a questionable statement, per se, but Hart's remark is of a significantly dangerous nature when coupled with another statement which soon follows:

It is unfortunate but not illegal if the commander unintentionally erred in his judgment about the size of the force he faced and caused excessive civilian casualties . . . The natural tendency of battlefield commanders is to take steps to avoid excessive casualties to their own units through the employment of all firepower means available to them . . .<sup>6</sup>

Although Hart correctly points out that precise estimates are extraordinarily difficult in warfare,<sup>7</sup> he seems to have forgotten at this point that actual knowledge or intent is not the only standard for criminal responsibility. Another standard, involved as well in the Yamashita case, is that of culpable negligence (integrating the factors of "foreseeability" and "reasonableness" under the circumstances) which is a standard relevant to prosecutions for command dereliction, all disorders and neglects to the prejudice of good order and discipline, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital.<sup>8</sup> If a commander does not have actual knowledge concerning the size of the enemy force he is about to engage or the degree of civilian involvement and danger in the battle context, it does not mean that he avoids all legal responsibility if he levels a village with all available firepower. A command decision must be made according to the facts available to the commander at the

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moment in question but with foreseeable consequences in mind and with a conscious effort to engage the enemy by lawful and proportionate means. A conscious effort must be made to cause as little excess death, destruction, and suffering as circumstances allow, and an "unintentional" error in judgment can still amount to a dereliction of a criminal nature in certain circumstances. Furthermore, a "disproportionate" use of firepower does not result in an "incidental" or noncriminal injury to civilians but a war crime. Indeed, the proper articulation of command criminal responsibility is expressed in terms of the longstanding "knew or should have known" test,<sup>9</sup> and it is perfectly proper for society to punish criminal intent plus conduct or to restrain the activities (especially military command functions) of those who have demonstrated a "dangerous" quality by their unintended dereliction. Perhaps it would even be legally incumbent upon a superior to take away the command of such a person in order to assure his own compliance with the law of war. Hart is certainly correct, however, in stating that criminality is dependent upon fact and the actual state of the law rather than myth or politicized conclusions as found regrettably too often in the writings of Professor Falk and others.<sup>10</sup>

With regard to reasonable corrective action by the commander, it should be noted that in the past prosecutions have been based partially on the failure to control troops, disregard of troop conduct, acquiescence in troop activity, dereliction of duty, general complicity (incitement, approval, aiding and abetting, accessory responsibility, conspiracy), failure to properly educate troops or to suppress crime, failure to prosecute troops who violate the law, failure to enforce the law generally, failure to maintain troop discipline, failure to investigate incidents, failure to report incidents to higher authorities, and at least in one case the failure to

resign from office. Many of these are interrelated and are tied to dereliction of duty in the general sense of the phrase "failure to take reasonable corrective commander action."

The U.S. view, which is consistent with international normative precepts, can be found in FM 27-10, paragraphs 501 and 507 (b) which state:

501 . . . The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.

507 . . . Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.

The Navy text states that the commander is responsible for acts of his subordinates when such acts are committed "by order, authorization, or acquiescence of a superior." The fact that the commander did not order, authorize, or acquiesce in illegal conduct does not relieve him from responsibility if "it is established that the superior failed to exercise his authority to prevent such acts and, in addition, did not take reasonable measures to discover and stop offenses already perpetrated."<sup>11</sup> Such corrective action should entail criminal investigation, enforcement of the law, and effective education and law implementation programs designed to suppress other illegal conduct, and to maintain a watch on troop attitudes, knowledge of legal obligations, training, and performance.

A commander can also be guilty, as any soldier, of the crime of com-

plicity,<sup>12</sup> but complicity does not include the actions of all those contributing to the crime "in the normal exercise of their duties."<sup>13</sup> Complicity involves more than a contribution, it involves a necessary guilty intent.<sup>14</sup> We should not forget, however, that society can act to remove from the armed forces those individuals who though lacking any subjective mental guilt or moral wrongdoing have nevertheless demonstrated a dangerous quality which society can ill-afford to be exercised.<sup>15</sup>

A good military commander is not merely interested in criminal responsibility in the case of his own failure or his unit's failure to conform to legal precepts. Today he should also be concerned with the self-motivations for following the law. Gen. Harold K. Johnson once stated, "Our duty as soldiers is to defend the Constitution and to uphold the laws that flow from its basic provisions. Under our Constitution, treaties made by the United States with other nations become part of our laws." The American soldier and his commander have a legal obligation to uphold international law and took an oath to obey the law of this land at all times. To do less would not only violate the law but would violate the sanctity of that oath and would depreciate a long-standing military tradition of honor and self-sacrifice for the preservation and promotion of that law and the values of American society. The words "patriotism" and "duty" are sometimes misused or misunderstood, but the essence of a soldier's duty and patriotism lies within the law—no man or group of men are higher than the law, and no commander has the prerogative to disobey the law in order to accomplish his mission. In fact, to think that you as a soldier or commander are beyond the law or to disobey it is to destroy law and order, disregard duty, deface patriotism and religious convictions, and defile a long history of honorable military service.

Recognizing this responsibility is not

in deference to false 19th century sentimentality, but rather is a perception of the true and more lasting base of power and the efficacy of law itself in the consent of reasoning man. Even the most cynical pragmatist and skeptic of international law should see the value of conformity to world expectations concerning the operations of warfare, the protection of human beings from the effects of violence and the futility of raw physical power in the face of strong public opposition (whether or not the skeptic is operating in a conventional or unconventional war setting). Violations of the law can also result in a breakdown of troop discipline, command control, and force security; subject troops to reciprocal violations on the battlefield or in PW camps; and cause the defeat of an entire army in a guerrilla or other war through alignment of neutrals on the side of the enemy and hostile public opinion.

Finally, it is remarkable that the editor of the *Naval War College Review* chose to add beneath Lieutenant Colonel Hart's work a quotation so contrary to the spirit of the norms and values disclosed in the article itself\*—a quotation from one of the highest ranking U.S. commanders ever convicted for violating the law of war, Brig. Gen. Jacob Smith.<sup>16</sup> How more proper it would seem to have been to have added the words of President Theodore Roosevelt who approved the conviction of General Smith with the statement that:

I am well aware of the danger and great difficulty of the task our Army has had in the Philippine Islands, and of the well-nigh intolerable provocations it has received from the cruelty, treachery and total disregard of the rules and customs of civilized warfare

\*Ed.—Excerpts are often selected with a view toward stimulating thought of the very type Captain Paust has written.

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on the part of its foes . . . But the very fact that warfare is of such character as to afford infinite provocation for the commission of acts of cruelty by junior officers and enlisted men must make the officers in high and responsible positions peculiarly careful in their bearing and conduct so as to keep a moral check over any acts of an improper character by their subordinates . . . Loose and violent talk by an officer of high rank is always likely to excite wrongdoing by those among his subordinates whose wills are weak or whose passions are strong.

How more fitting it would have been to add as well the words of Gen. Douglas MacArthur—words which describe the essence of a soldier's duty and words of legal relevance since they were uttered while confirming the death sentence of General Tomayuki Yamashita in 1946:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are

long and honorable. They are based upon the noblest of human traits—sacrifice.

In my opinion there are few who would disagree with these statements or who do not share the commitment to law and the underlying values necessary for law implementation and military professionalism. There are, instead, those who are not sufficiently aware of the substantial utility of legal norms as a guide for command decision, and those with an insufficient knowledge of the content of legal norms to recognize that utility and to formulate practical alternatives to crime. If this is correct, then we are already well on the way toward a social order where law is utilized in reaching professional military decisions. When commanders recognize the practical utility of law, are familiar with its general content, and are given the opportunity in advanced schooling to clarify goals, to make a searching analysis of law in context, and to formulate alternative responses, then will law be truly effective in governing field decisions. It is only in this way that we can adequately prepare America's military leaders for their tasks and to assure them of the guidance they seek and require in order to perform professionally within the law.

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## FOOTNOTES

1. Franklin A. Hart, "Yamashita, Nuremberg and Vietnam: Command Responsibility Reappraised," *Naval War College Review*, September-October 1972, p. 31.

2. Actually you must never engage the "populated area" but must direct your firepower at the legitimate military target within the populated area as far as circumstances permit a precision of firepower.

3. See Hart, p. 32.

4. U.S. Dept. of the Army, *The Law of Land Warfare*, FM 27-10 (Washington: U.S. Govt. Print. Off., 1956), paras. 3, 34, 41, 56 (hereinafter cited as FM 27-10); U.S. Dept. of the Navy, Office of Chief of Naval Operations, *Law of Naval Warfare*, NWIP 10-2 (Washington: 1955), paras. 220-221 (hereinafter cited as NWIP 10-2); and "United States of America versus William List, et al." *Trials of War Criminals Before the Nuremberg Military Tribunals* (Washington: U.S. Govt. Print. Off., 1950), v. XI, p. 1255, 1296-1297.

5. Compare the text with W. Solf, "A Response to Telford Taylor's Nuremberg and Vietnam: An American Tragedy," *University of Akron Law Review*, v. V, p. 43, 45, 49-50 (1972); William G. Downey, "The Law of War and Military Necessity," *American Journal of International Law*, April 1953, p. 251; and FM 27-10, paras. 3, 34, 41, and 56.

6. Hart, p. 31-32.



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7. *Ibid.*, p. 31; see also Taylor, p. 35; and "United States of America versus William List, et al.," p. 1296-1297.

8. See Jordan J. Paust, "My Lai and Vietnam: Norms, Myths and Leader Responsibility," *Military Law Review*, v. LVII, p. 164-185; and see *Uniform Code of Military Justice*, arts. 92 and 134; plus *Manual for Courts Martial*, § 17(c) which states:

A person is derelict in the performance of his duties when he willfully or negligently fails to perform them, or when he performs them in a culpably inefficient manner . . . When the nonperformance is the result of a lack of ordinary care, the omission is negligent. Culpable inefficiency is inefficiency for which there is no reasonable or just excuse.

See also *U.S. Army Subject Schedule 27-1* (1970); and *The Law of Land Warfare: a Self-Instructional Text*, D.A. Pam. 27-200 (1972).

9. See Paust, p. 176; and Hart, p. 29-30. Note that the "should have known" test is amply articulated in numerous cases and is a bit different than Hart's "blatantly ignores" test. Compare Paust at p. 175-185 and "United States of America versus William List, et al.," p. 1256 and 1271 with Hart, p. 33. Hart recaptures the language of the "should have known" test on page 34.

10. See Hart, p. 32; and Paust, p. 103, n. 8; for some of Telford Taylor's loose language in this regard see Solf; and Paust, p. 178, n. 295.

11. NWIP 10-2, para. 330b(4); see also *The Law of War on Land, Manual of Military Law, Part III* (London: Her Majesty's Stationery Office, 1958), p. 178, stating that the commander is responsible if he knew or should have known of illegality committed or about to be committed and he fails "to use the means at his disposal to ensure compliance with the law of war," and that the failure raises a presumption (not easily rebuttable) of connivance, authorization, encouragement, acquiescence, or subsequent ratification. It is also stated,

it is probable that the responsibility of the commander goes beyond the duty formulated above. He is also responsible if he fails, negligently or deliberately, to ensure by all the means at his disposal that the guilty are brought to trial, deprived of their command or ordered out of the theatre of war, as may be appropriate. [emphasis added.]

See *ibid.* at 179 for references to Canadian, Dutch, and French law.

12. United Nations, General Assembly, "Principle VII," *Principles of the Nuremberg Charter and Judgment, Official Records*, v. V, supp. 12, U.N. Doc. A/1316 (1950); see also United Nations, General Assembly, International Law Commission, *Draft Code of Offenses Against the Peace and Security of Mankind*, v. IX, supp. 9, art. 2(13), p. 11-12, U.N. Doc. A/2693 (1954); and *Trial of Accused War Criminals*, sec. 6, rule 47, Order of General MacArthur, General H.Q., U.N. Command, Tokyo, Japan, AG 000.5 (28 October 1950).

13. Morris Greenspan, *The Modern Law of Land Warfare* (Berkeley, University of California Press, 1959), p. 469, citing United Nations, International Law Commission, U.N. Doc. A/CN.4/48 (1951). See also "Switkes versus Laird," 316 F. Supp. 358, 365 (S.D.N.Y. 1970).

14. *Id.*; see also *id.* at 35, n. 241.

15. See Joseph B. Kennan and Brandon F. Brown, *Crimes Against International Law* (Washington: Public Affairs Press, 1950), p. 137; and *The Law of War on Land, Manual of Military Law*.

16. See *Army Subject Schedule 27-1*, p. 16 (1970). For a documented American experience with the prosecution of U.S. soldiers and civilians for violations of the law of war since the formation of this Nation, see Paust, p. 112-118.

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Diversity of opinion within the framework of loyalty to our free society is not only basic to a university but to the entire nation.

James Bryant Conant: *Education in a Divided World*, 1948